

Uttamchand Vs. Mohandas

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SooperKanoon Citation : sooperkanoon.com/751156

Court : Rajasthan

Decided On : Jul-18-1963

Reported in : AIR1964Raj50

Judge : C.B. Bhargava, J.

Acts : [Contract Act, 1872](#) - Sections 65; [Partnership Act, 1932](#) - Sections 30; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 100 - Order 6, Rules 2 and 17

Appeal No. : Second Appeal No. 592 of 1962

Appellant : Uttamchand

Respondent : Mohandas

Advocate for Def. : C.L. Agarwal and; R.S. Kejriwal, Adv.

Advocate for Pet/Ap. : D.P. Gupta, Adv.

Disposition : Appeal dismissed

Judgement :

C.B. Bhargava, J.

1. This is a defendant's second appeal against the judgment and decree of the Senior Civil Judge, Jaipur City dated 25th October, 1962 affirming the judgment and decree of the Munsif, Jaipur City East dated 28th February, 1962.

2. The respondent who is a minor filed the presentsuit through his next friend on 9th March, 1961 for dissolution of partnership and rendition of accounts and injunction against the appellant on the basis of an agreementof partnership dated 31st January, 1959. The plaintiff inthe suit also claimed delivery of possession of the shopin which the business of partnership according to him, wasbeing carried on.

It was alleged in paragraph 1 of the plaint that the plaintiff was owner of shop No. 166 situate in Bapu Bazar, Jaipur. It was then alleged that the guardian of the plain-tiff entered into an agreement of partnership for carrying on the business of manufacturing Uttam Sewing Machines with the defendant on 31st January, 1959 and a deed of partnership was executed between the parties on the same day. According to the terms of the agreement of partner-ship the partnership was to be for a period of two years i.e., upto 31st January, 1961, the plaintiff contributed Rs. 2000/- for his share in the capital by way of furniture and fittings in the above shop where the business was to be carried on, the defendant was also to invest Rs. 2000/-, that the plaintiff was entitled to -/4/- share In the profit of the business and the defendant was to pay Rs. 55/- p.m. to the plaintiff out of the profits of the business for the up-keep and maintenance of the plaintiff which he was not bound to refund even if there were losses in the business, that the defendant was bound to deliver vacant possession of the shop to the plaintiff on 31st January, 1961 after the expiry of the term of partnership along with the furniture and that the defendant was not to let out the shop to any one else during the term of partnership. It was alleged that the term of partnership had come to an end on 31st January 1961 and the defendant had not rendered accounts of partnership business to the plaintiff nor had he delivered vacant possession of the shop to him and was intending to transfer its possession to a third person. It was claimed that the plaintiff's suit for dissolution of partnership and rendition of accounts be decreed against the defendant and he be directed to deliver vacant possession of the shop to him.

3. The suit was resisted by the defendant. He admitted the execution of the deed of partnership but stated that the real intention of the parties was to lease out the shop to the defendant on a monthly rental of Rs. 55/-which the plaintiff had been receiving regularly from him. In paragraph 3 of the written statement it was stated

that the agreement of partnership being with a minor and this being void the plaintiff was not entitled to get a decree for rendition of accounts on its basis. He denied that plaintiff had fixed any furniture in the shop. He further denied the plaintiff's right to get his shop vacated from him. It was also stated that the shop in dispute had been in possession of Small Industries Co-operative Society from the beginning and the defendant had been paying rent of the shop to the plaintiff through that Society. In the end it was stated that the plaintiff's suit was not maintainable because prima facie the alleged partnership was illegal.

4. Plaintiff in reply submitted a rejoinder and amongst other objections he claimed that in case the agreement of partnership was found void a decree for possession of the shop and recovery of furniture or its price be allowed to him. This rejoinder was not allowed to be put in by the Court.

Plaintiff then submitted an application for amending his plaint claiming in the alternative that in case the agreement of partnership was found to be void, a decree for possession of the shop, recovery of furniture and arrears at the rate of Rs. 55/- be allowed to him,

5. The defendant opposed the application and the learned Munsif by his order dated 6th February, 1962, did not allow the plaintiff to amend his plaint holding that it would change the nature of the case. Reliance was placed on *New Churulia Coal Co. Ltd. v. Union of India*, (S) AIR 1956 Cal 138.

6. The trial Court framed the following issues:

1. Whether the suit for rendition of accounts was not maintainable on the basis of agreement dated 31-1-1959 as the real intention of the parties by the said deed was to lease out the shop to the defendant at a monthly rent of Rs. 55/-?

2. Whether the plaintiff was not entitled to have his shop vacated because he had not fixed furniture in the shop and had thus not performed the terms of the agreement?

3. Whether there can be no agreement of partnership with a minor and what was its effect on the suit?

4. Whether the defendant had been paying rent to the plaintiff through Small Industries Co-operative Society and as such the Society was a necessary party to the suit?

5. To what relief is the plaintiff entitled?

7. The parties did not adduce evidence in the case. Defendant submitted an application that burden of issues had been wrongly put on him. He therefore, does not want to lead any evidence. It was stated in the application that Issue No. 3 should be caste and its burden be cast on the plaintiff to prove his case.

8. The trial Court dismissed the plaintiffs suit for rendition of accounts holding that the agreement dated 31st January, 1959 was void. It was urged before the trial Court that the plaintiff was entitled to get back the shop and its furniture tinder the provisions of Section 65 of the Indian Contract Act. The trial Court disallowed the plaintiff's claim for furniture or its price because there was no evidence on record to prove that the plaintiff had fixed furniture in the shop. Plaintiff's claim for Rs. 55/- p.m. was also disallowed because the plaintiff had not said that the aforesaid amount had not been paid to him. On the other hand the defendant had specifically pleaded that Rs. 55/- had been regularly paid to the plaintiff. Plaintiff's claim for possession of the shop was however, allowed by the trial Court and it ordered the plaintiff to pay the requisite Court fee for that relief. The court-fees having been paid a decree for delivery of possession of shop No. 166 was passed in favour of the plaintiff. Two months' time was allowed to the defendant to vacate the shop.

9. The defendant went in appeal to the District Judge, Jaipur City and the main ground taken in the memo of appeal was that the trial Court was in error in complying (applying ?) the provisions of Section 65 of the Indian Contract Act, to the present case. It was not suggested before that Court that the defendant had any defence to make in case the plaintiff pleaded for the alternative relief treating the agreement as void. The learned Senior Civil Judge who heard the appeal overruled the defendant's objection and held that in the circumstances of the case Section 65 of the Contract Act properly applied. The appeal was therefore, dismissed.

10. In this appeal it is urged by the learned counsel for the appellant that as the agreement of partnership was void from its inception, Section 65 of the Contract Act would not apply to such a case. Reliance is placed on *Ajudhia Prasad v. Chandan Lal*, AIR 1937 All 610 (FB), *Kalipada Koer v. Purnabala Dassi*, AIR 1948 Cal 269, *Dhanna Munda v. Mt. Kosila Banian*, AIR 1941 Pat 510 and *Hussain Kasam Dada v. Vijaynagaram Commercial Association (Regd.)*, AIR 1954 Mad 528.

It is also contended that the plaintiff claimed the reliefs in the suit on the basis of agreement dated 31st January, 1959. It was not pleaded by him that the agreement had been discovered to be void and as such he was entitled to get back possession of the disputed shop. It is contended that the defendant had no opportunity of meeting this case and as siren in the present suit the plaintiff cannot be allowed relief which the Courts below have given to him.

11. The respondent on the other hand urges that relief under Section 65 of the Act has been properly given to the plaintiff in this case and in support of this submission he relies upon *Mt. Bachai v. Hayat Mohammad*, AIR 1937 Oudh 521, *Bishen Singh v. Bishna*, AIR 1924 Lah 294 and *Appasami Ayyangar v. Narayanaswami Iyer*, AIR 1930 Mad 945.

12. The question, therefore, which falls for determination is whether the respondent is entitled to the possession of the shop in dispute from the appellant under the provisions of Section 65 of the Indian Contract Act. The intention of the section is to prevent a party to a void agreement, to retain benefits received under it. The section is not restricted to agreements which are void on grounds of facts. The agreement may be void on grounds of law and yet there may be circumstances which may bring it within the purview of this section when it is shown that agreement was discovered to be void after the date it was made. In *Ajudhia Prasad's* case, AIR 1937 All 610 (FB), the party to the agreement was a minor and incapable of contracting. So it was held that as there should and never be a contract, Section 65 of the Contract Act could have no application to such a case, as that section starts from the basis of there being an agreement of contract between competent parties. Similarly, in *Kalipada Koer's* case, AIR 1948 Cal 269,

there was a contract on behalf of the minor by a person who was not competent to contract on his behalf. It was held that there was no contract in law and to such a case Section 65 had no application. In Hussain Kasam Dada's case, AIR 1954 Mad 528, it was held that:

'Section 65 of the Contract Act cannot have any application to any agreement which is 'ab initio' void and is known to be such to the parties at the time it was entered into.'

The contracts in this case were prohibited by Oil Seeds Forward Contracts Prohibition Orders. In Dhanna Munda's case, AIR 1941 Pat 510, it was held that:

'Section 65 cannot be held to apply to a case of a contract void as being contrary to the statute law which the parties must be presumed to have known at the time when they entered into the contract.'

In the first two cases there was no contract in law. In the third case it was known to the parties that the agreement was void when it was entered into. The last mentioned case of course lays down that parties must be presumed to know the law and when a contract is contrary to the statute law Section 65 would not apply. But as stated earlier the above presumption can be rebutted by establishing circumstances to prove that the parties by lack of knowledge, appreciation or misapprehension as to their rights did not know in fact that the agreement in which they had entered into was void. The above view finds support from the following decision of the Privy Council. In Harnath Kuar v. Indar Bahadur Singh, AIR 1922 PC 403, a Hindu of two taluqas in Oudh sold his rights as primogeniture, reversioner of certain villages. Their Lordships of the Privy Council held that:

'The agreement was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.'

Relief was sought on the basis of Section 65 of the Contract Act though the suit was filed to enforce the agreement. It was laid down by their Lordships that:

'Section 65 deals with (a) agreements and (b) contracts. The distinction between them is apparent from Section 2. By Clause (e) every promise and every set of

promises forming the consideration for each other is an agreement, and by Clause (h) an agreement enforceable by law is a contract. Section 65, therefore deals with (a) agreements enforceable by law and (b) with agreements not so enforceable. By Clause (g) an agreement not enforceable by law is said to be void.

'An agreement therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject-matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower Courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of the 2nd January, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation.

It was thus that that the agreement was discovered to be void, and the discovery in their Lordships' view was one within the words and the meaning of Section 65 of the Contract Act.'

In *Nisar Ahmad Khan v. Raja Mohan Manucha*, AIR 1940 PC 204, agreement Ex. 5 was void but still it was held that there was enough justification in the circumstances of that case to hold that it was discovered to be void within the meaning of Section 65 of the Contract Act. The Privy Council in a still later case in *Raja Mohan Manucha v. Manzoor Ahmad Khan*, AIR 1943 PC 29, where the mortgage was executed without the permission of the Collector and was invalid, held that:

'The transaction in question was an open and honest transaction and its invalidity was at the time obscured by the difficulty in applying Para. 11 of Schedule 3 correctly to the particular facts of the execution proceedings and to the terms of the orders as recorded. For ten years payments of interest were made and received thereunder.'

In those circumstances it was held that the agreement was not discovered to be void until after the suit was instituted. On the authority of the above mentioned Privy Council cases it can, therefore, safely be inferred that even though an agreement may be void on ground of law yet there might be circumstances showing that the parties to the agreement did not correctly appreciate the implications of law which declared such agreement as void and in such cases the agreement can be said to be discovered to be void at some later stage within the meaning of Section 65 of the Contract Act. It also follows from the above Privy Council decisions that even though the plaintiff comes to the Court seeking relief on the basis of the void agreement treating the agreement as valid one, still relief can be given to him under the provisions of Section 65 of the Contract Act when it is shown that the agreement was discovered to be void during those proceedings. Harnath Kuar's case, AIR 1922 PC 403 is a clear authority for that view. In Raja Mohan Manueha's case, AIR 1943 PC 29 a prayer was made before the Chief Court of Oudh to grant relief to the plaintiff under Section 65 of the Contract Act and the Chief Court refused to entertain that ground as it was not taken in the memorandum of appeal. They further left the plaintiff to seek remedy by a separate suit. But their Lordships of the Privy Council allowed relief to the plaintiff under Section 65 of the Contract Act even though the suit was based on the mortgage which was held to be void.

In the present case the agreement was entered into not by the minor himself but by his guardian Sundar Dass his uncle. There can be no doubt that guardian of a minor can enter into contracts on his behalf. There can also be no doubt that a minor can be admitted to the benefits of a partnership. A guardian of a minor therefore, can validly enter into a contract admitting the minor to the benefits of a partnership, where a partnership already exists though he cannot be made a partner in a firm (vide Section 30 Indian Partnership Act). Therefore, a contract by

a guardian of a minor admitting him to the benefits of partnership would be a perfectly valid agreement. The agreement in this case recited in paragraph 16 that the partner No. 2 being a minor shall not in any way be liable for any loss incurred by the partner No. 1 in his business, and all the amounts drawn on his behalf for his up-keep and maintenance shall not be refunded in case of loss. In paragraph 15 it was provided that partner No. 1 shall pay out of profit a sum of Rs. 55/- every month to Shri Sundardas for the upkeep and maintenance of the minor partner Shri Mohandas and pass a valid receipt thereof. It would thus appear from the above terms that at the time of the agreement it was intended by the parties that the minor was only to get profits and was not to be liable for the losses suffered in the business. Both parties regarded this agreement as valid and the defendant on his own showing continued paying Rs. 55/- to the plaintiff regularly. The very fact that the present suit was filed to enforce this agreement shows that the plaintiff till the filing of the suit regarded the agreement in question as valid and enforceable in law. It was only when the defendant filed his written statement and pleaded that the agreement in question was void because a minor could not enter into a partnership, that the plaintiff discovered that the agreement was void and so he submitted a replication and after its rejection an application for amending his plaint praying for alternative relief in case his prayer for rendition of accounts failed on account of the agreement being void.

13. Now in the above circumstances though the agreement is unquestionably void, yet there are circumstances which show that the parties did not correctly appreciate the implications of the law applicable to that agreement i.e., (Section 30 of the Indian Partnership Act). On the facts and circumstances of the case and looking to the terms of the agreement and the conduct of the parties, it can be safely concluded that the agreement in the present case was discovered to be void when the defendant filed his written statement in the case and thus Section 65 Contract Act applies to the case.

14. It is urged by the learned counsel for the appellant that as the plaintiff's application for amending the plaint was disallowed and in the plaint as it stands, there is no averment by the plaintiff that the agreement is void he cannot be allowed the relief for recovery of possession of the shop. In that connection

learned counsel strongly relies upon (S) AIR 1956 Cal 138. In that case there was an agreement which being not in the form prescribed by Section 175(3) of the Government of India Act (1935), was void. The plaintiff filed a suit on the basis of that agreement. During the trial on behalf of the defendant it was clearly pleaded that the agreement was void. No steps were taken by the plaintiff to amend his plaint and when the matter came before the High Court, it was claimed that he was entitled to relief under the provisions of Section 65 of the Indian Contract Act.

The learned Judge did not allow the plaintiff to raise that question because there were no pleadings in the case on that point. It was observed that although the point was expressly taken in the written statement no application is made for amendment of the plaint. The learned Judge observed that:

'The obligation to pay compensation or to restore the benefit received under a void agreement is completely different from that under the agreement itself. The obligation to make compensation in respect of the contract discovered to be void is like a phoenix that can be raised again by one of the parties from the dead ashes of its former self. Before the new right can come into being the old right must die; the cause of action under Section 65 cannot exist side by side with the cause of action under the contract itself.'

The learned Judge in the course of his judgment noticed the above mentioned Privy Council cases and felt difficulty in dismissing outright the plaintiffs claim under Section 65 but regarded those judgments as exception to the general law that a party cannot be allowed to succeed in a case not made out in the pleadings. Since in the above case there was no application made for leave to amend the plaint and probably deliberately in order to avoid the objection which might be taken in the grounds of objection under Section 80 C. P. C. the learned Judge refused the relief under Section 65 of the Contract Act.

It may be noted that even in that case it was urged on behalf of the plaintiff that there was evidence to show that the agreement was discovered to be void subsequently. The learned Judge examined the evidence of Mr. Bhattacharjee in that connection but on that evidence too was not satisfied that the agreement was discovered to be void on the date mentioned by the witness. This case, is

therefore, of no assistance to the appellant.

In the present case this charge cannot be laid against the plaintiff that he did not seek leave to amend his plaint. As noted above at the earliest stage when the defendant took objection that the agreement was void, he sought leave to amend his plaint. The defendant objected on the ground that it changed the nature of the case and the Court agreed with him. The order of the Court in rejecting the amendment application was clearly wrong. Inconsistent facts could be pleaded. Alternative reliefs are allowed to be claimed in one litigation so that the necessity of another litigation may be obviated. In this connection reference may be made to *Firm Srinivas Ram Kumar v. Mahabir Prasad*, AIR 1951 SC 177, where it was held that:

'A plaintiff may rely upon different rights alternatively and there is nothing in the C. P. C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant, in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.

Thus, where in a suit for specific performance of a contract, in part performance of which the plaintiff alleges to have paid the defendant some money, the defendant denies the contract and pleads that the money was taken by him as a loan, the court can pass a decree for recovery of the loan in favour of the plaintiff on his failure to prove the contract even though the plaintiff had failed to plead, and claim

relief on this alternative case.'

In the present case therefore, what the plaintiff was trying to do was to claim an alternative relief on the ground of failure of the agreement on which he had based his suit. As stated above the amendment was wrongly rejected by the trial Court. However, at the end of the trial, the Court thought that it could grant relief to the plaintiff under Section 65 of the Indian Contract Act and accordingly did it. The defendant before the first appellate Court only urged that Section 65 was inapplicable to the facts of the case as the agreement from its inception was void. It was not urged before the first appellate Court that on the pleadings the plaintiff was not entitled to that relief or that the defendant had no opportunity of meeting that case. It is only here at this stage that the learned counsel says that the plaintiff should not be allowed relief which has been given to him by the courts below in the present suit unless he makes an application to amend his plaint and the defendant is allowed an opportunity to meet the case.

I am however, unable to accede to that contention. At this stage it sounds very ill in the mouth of the defendant to say that either the plaintiff should be driven to a separate suit to get relief or should be directed to amend his plaint. When the plaintiff sought to amend his plaint the defendant objected to it. As a result the application was rejected by the trial Court. In the first appeal he also did not raise any objection. Learned counsel for the appellant on being asked says that if the suit had been properly framed he would have been able to put up a defence that the shop in dispute had been leased out to him even before the agreement dated 31st January, 1959 was entered into. However, I do not find even an indication of that plea in the written statement filed by the defendant in this case. In the plaint, it was clearly stated that the plaintiff was the owner of the shop in dispute. The defendant denied the plaintiff's ownership. It was also stated in the plaint that after the expiry of the term of partnership i.e., on 31st January, 1951 the defendant would hand over vacant possession of the shop to the plaintiff. It was further stated that the plaintiff was entitled to get back possession of the shop after 31st January, 1961 and he demanded its possession from the defendant but he had refused to do so. Amongst other reliefs sought in the plaint the plaintiff claimed that the possession of the shop be delivered to him.

It is true that in the plaint it was not stated that the agreement of partnership was void and hence the plaintiff was entitled to get back possession of the shop under Section 65 of the Contract Act, but the above allegations clearly disclose a cause of action for claiming possession of the shop, that the plaintiff was the owner of the shop, that the defendant could remain in its possession till 31st January, 1961 according to the terms of the agreement which having expired he was entitled to get back its possession.

In his reply the defendant admitted the execution of the agreement and stated that the real intention of the parties was to lease out the shop in dispute at a monthly rent of Rs. 55/- to the defendant. He also stated that he had been paying regularly Rs. 55/- to the plaintiff in pursuance of the terms of the agreement. On his plea the Court framed issues Nos. 1 and 4. The defendant urged before the trial Court that the burden of all the issues had been wrongly put upon him and did not lead any evidence in regard to those issues. But the learned counsel has not been able to point out as to how the burden of issue Nos. 1 and 4 was wrongly put on the defendant.

From the pleas taken by the defendant in the written statement I do not see with what justification can the learned counsel urge at this stage that his client was in occupation of the disputed shop from before the agreement dated 31st January, 1959. The agreement dated 31st January 1959 contains a clear admission of the defendant that the shop No. 166 situate in Bapu bazar, Jaipur City exclusively belonged to the plaintiff. There is further recital in the document that the business of the firm shall be carried on in that shop after the dissolution of partnership after two years, the defendant shall vacate the shop and hand over vacant possession to Shri Sundardas, guardian of the plaintiff with all the fittings furniture etc. in good condition.

I have given my anxious consideration to this matter but I have not been able to see what defence the appellant could have made even if it had been stated in the plaint that the agreement of partnership being void the plaintiff was entitled to the possession of the shop. Obviously the agreement was entered into on 31st January, 1959 and the present suit was filed two years after i.e., on 9th March,

1961. There was no question of limitation in the case and no conceivable objection could be made to defeat the plaintiff's suit. I am therefore, of the view that the plaintiff can be allowed relief for recovery of possession of his shop from the defendant under the provisions of Section 65 of the Indian Contract Act, even though it is not stated in the plaint that the agreement on which he based his suit was void, because in my opinion there was sufficient material on record on which he could be given that relief.

Apart from the provisions of Section 65 Contract Act the plaintiff being the owner of the shop in dispute and the suit for recovery of possession not being barred by limitation, is entitled to get his property back from the defendant even under the general law. The plaintiff claims that he is the owner of the shop. He has disclosed the ground on which he is entitled to get back possession of the property. He has also claimed relief for recovery of possession. In a suit for recovery of possession of immovable property nothing more is required to be stated by the plaintiff. It has not been pointed out to me by the learned counsel for the appellant how this clause of the agreement that the plaintiff will be entitled to get back the vacant possession of the shop after the expiry of two years, is void. Therefore, both as a matter of law and equity, the plaintiff who is a minor is entitled to the relief which has been allowed to him by the Courts below. It would be very unjust if he is driven to seek his relief in a separate suit.

15. I, therefore, see no force in this appeal which is hereby rejected with costs. The appellant is allowed two months' time to deliver possession of the shop.

16. Leave to appeal to a larger bench is refused.